

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2013 MSPB 57**

Docket No. DC-3330-11-0405-C-1

**Herbert Russell,
Appellant,**

v.

**Department of Health and Human Services,
Agency.**

July 24, 2013

Herbert Russell, Charlotte, North Carolina, pro se.

Emily Lerner, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 On February 2, 2012, the Board issued an Opinion and Order in this case finding that the agency had violated the appellant's rights under the Veterans Employment Opportunities Act of 1998 (VEOA) and ordering corrective action. *Russell v. Department of Health & Human Services*, [117 M.S.P.R. 341](#), ¶¶ 14, 17 (2012). The appellant subsequently filed a petition for enforcement on March 19, 2012, alleging that the agency had not complied with the Board's Opinion and Order. Compliance File (CF), Tab 1. On April 25, 2012, the administrative judge issued an initial decision finding the agency in compliance with the Board's

Opinion and Order, CF, Tab 8, Compliance Initial Decision, and the appellant has petitioned for review of that decision, Compliance Petition for Review (CPFR) File, Tab 1. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the compliance initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.¹

BACKGROUND

¶2 In October 2010, the agency issued vacancy announcement HHS-FDA-04-2011-0005 for the position of Social Science Analyst (Organizational Development), GS-0101-12/13. MSPB Docket No. DC-3330-11-0405-I-1, Initial Appeal File (IAF), Tab 5, Subtab 2m. The top three ranked applicants, whose names were forwarded to the selecting official, were not preference eligible and received scores of 99.49, 99.49, and 99.18. *Russell*, [117 M.S.P.R. 341](#), ¶ 7. The preference-eligible appellant received a score of 94.69, which apparently included only a 5-point preference rather than the 10-point preference to which he was entitled. *Id.*, ¶¶ 7, 14. Pursuant to the announcement, the agency selected one of the other applicants to fill the position. *Id.*, ¶ 7.

¶3 The appellant filed a veterans' preference complaint with the Department of Labor (DOL) regarding the nonselection. *Id.*, ¶ 8. In response to an inquiry from DOL seeking a written statement of the agency's position regarding the appellant's allegations, the agency indicated that, although the appellant met the positive education and the specialized experience requirements for the position, he was not among the top scoring candidates who were referred to the selecting official for consideration. IAF, Tab 5, Subtabs 2c, 2d. DOL subsequently

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

informed the appellant that it had closed its investigation, and he timely filed this VEOA appeal with the Board. *Russell*, [117 M.S.P.R. 341](#), ¶ 8. After holding a hearing, the administrative judge issued an initial decision, which denied the appellant's request for corrective action. *Id.*

¶4 When his appeal came before the Board on petition for review, the Board found that the agency had violated the appellant's right to a full 10-point preference in competing for the Social Science Analyst (Organizational Development) position and ordered the agency to reconstruct the selection process after adding 5 more points to the appellant's score. *Russell*, [117 M.S.P.R. 341](#), ¶ 14. Given the Board's finding that it appeared the appellant would have been the top-ranked applicant had he received a 10-point preference, the Board instructed the agency that it would need to go through the pass over procedures—including giving the appellant notice and an opportunity to respond to the Office of Personnel Management (OPM)—before selecting a lower-ranked nonpreference-eligible applicant through the reconstructed process. *Id.*, ¶¶ 7, 14.

¶5 Pursuant to the Board's order, the agency reconstructed the selection process. CF, Tab 6 at 20 of 67. As part of the reconstructed process, a Human Resources (HR) Specialist and a Subject Matter Expert independently evaluated the appellant's application and concluded that the appellant failed to meet the applicable OPM qualification standards and specialized experience requirements. *Id.* at 20-23 of 67. Because the agency found that the appellant was not minimally qualified for the position, it did not assign him a numerical score and therefore did not award him the 10-point preference. *Id.* at 7-8, 22 of 67. The agency explained that the appellant's assigned score from the original selection process was only a preliminary score generated by the QuickHire system based upon the appellant's assessment of his experience and was not based on the review of his application by the HR Specialist or the Subject Matter Expert. *Id.* at 6, 20 of 67.

¶6 The appellant filed a petition for enforcement in which he argued that the agency did not comply with the Board's order for a number of reasons. CF, Tab 1 at 5-12. In particular, the appellant alleged that the agency failed to add the 5 points to his score from the original selection process as ordered, that the agency failed to go through the pass over procedures before selecting a lower-ranked applicant as ordered, that the agency had already found him to be qualified for the position prior to the reconstruction of the selection process, and that the position should have been classified in the 0301 series rather than the 0101 series. *Id.* In an initial decision based on the written record, the administrative judge denied the appellant's petition for enforcement, finding that the agency had complied with the Board's Opinion and Order. Compliance Initial Decision. Specifically, the administrative judge found that the record showed that the appellant did not meet the education and experience requirements of the position and that nothing in VEOA mandates that veterans be considered for positions for which they are not qualified. *Id.* at 3-4. The administrative judge further found that the Board lacked jurisdiction over the appellant's arguments regarding the classification of the position and that the appellant was not entitled to the score from the original selection process because the record showed that an appellant's self-assigned score was only a preliminary score that was subject to review by an HR Specialist and Subject Matter Expert. *Id.* at 4-5.

¶7 The appellant has filed a petition for review of the compliance initial decision.² CPFR File, Tab 1. He continues to argue that the agency did not comply with the Board's Opinion and Order because the agency failed to add

² In his petition for review, the appellant alleges that his Motion for Improper and Defective Service was not ruled on by the administrative judge in the proceedings below, and he seeks a ruling from the Board. CPFR File, Tab 1 at 7; *see* CF, Tabs 5, 9. In his motion, the appellant requests that the Board find that the agency's service of its February 28, 2012 e-filing was improper and defective and that the Board reject the pleading and its attachments. CF File, Tab 9 at 9-10. Because there is no record of any agency filing that was e-filed on or about that date, we DENY the appellant's motion.

5 points to the score the appellant received during the original selection process and failed to go through the pass over procedures before selecting a lower-ranked applicant. *Id.* at 26. The appellant also continues to argue, among other things, that the position was inappropriately classified in the 0101 series and that he was qualified for the position, as evidenced by the agency's letter to DOL during the course of DOL's investigation of the appellant's nonselection indicating that the appellant was qualified for the position.³ *Id.* at 12-14, 20, 35, 55-56. The agency has filed a response in opposition to the appellant's petition for review. CPFR File, Tab 6. The appellant has filed an addendum to his petition for review. CPFR File, Tab 7.

ANALYSIS

¶8 The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). The Board's authority to remedy noncompliance is broad and far-reaching and functions to ensure that employees or applicants for employment are returned to the status quo ante or the position that they would have been in had the unlawful agency action not occurred. *Phillips v. Department of the Navy*, [114 M.S.P.R. 19](#), ¶ 7 (2010). The agency has the burden of proving that it has fully complied with a Board final decision. *Id.* The agency is required to produce relevant, material, and credible evidence of compliance in the form of documentation or affidavits. *Spates v. U.S. Postal*

³ The appellant further argues that the administrative judge did not rule on his request for litigation expenses. CPFR File, Tab 1 at 7. The administrative judge, however, docketed the appellant's request for attorney fees and litigation expenses separately and informed the appellant that any request for associated costs and expenses must be raised in that separate proceeding. Compliance Initial Decision at 2 n.1. That case has been docketed as MSPB Docket No. DC-3330-11-0405-A-1. In addition, the appellant has submitted alleged new evidence on review. CPFR File, Tab 1, Exhibits A-C, Tab 7, Exhibits 1-4. We have not considered this evidence, however, because it is not new and material to the outcome of the appeal. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980).

Service, [70 M.S.P.R. 438](#), 443 (1996). In order to comply with the Board's Opinion and Order, therefore, the agency must produce evidence showing that its reconstruction of the selection process for vacancy announcement HHS-FDA-04-2011-0005 was in accordance with applicable veterans' preference laws and that any subsequent appointment to the Social Science Analyst (Organizational Development) position was the result of fair and lawful consideration of the pool of candidates, including the appellant, under an appropriate and lawful reconstruction. *Phillips*, [114 M.S.P.R. 19](#), ¶ 7.

¶9 First, we agree with the administrative judge's determination that the Board lacks jurisdiction over the appellant's argument that the position at issue should have been classified in the 0301 series rather than the 0101 series. Compliance Initial Decision at 4-5 (citing *Saunders v. Merit Systems Protection Board*, [757 F.2d 1288](#), 1290 (Fed. Cir. 1985) (finding that the Board lacks jurisdiction over cases concerning the proper classification of a position)). We also agree with the administrative judge's findings that the Board did not mandate assigning the appellant any particular score on review of his application and that the Board does not have the authority to order the agency to appoint the appellant to a position for which he is not qualified. Compliance Initial Decision at 2-6; *see Russell*, [117 M.S.P.R. 341](#), ¶¶ 14, 17; *Ramsey v. Office of Personnel Management*, [87 M.S.P.R. 98](#), ¶ 9 (2000). However, we find that a conflict exists in the record with respect to whether the appellant indeed was qualified for the Social Science Analyst (Organizational Development) position at issue.

¶10 In order to meet the OPM qualification standards for this position, a candidate must possess a degree in behavioral or social science or related disciplines appropriate to the position,⁴ or a combination of education and

⁴ According to the agency's January 20, 2011 letter to DOL in response to the appellant's veterans' preference complaint regarding his nonselection, the number of hours that constitutes a major field of study is the amount specified by the college or

experience that provided knowledge of one or more of the behavioral or social sciences equivalent to a major in the field, or 4 years of appropriate experience that demonstrated acquisition of knowledge of one or more of the behavioral or social sciences equivalent to a major in the field. CF, Tab 6 at 64 of 67. In addition to meeting the OPM qualification standards for the position, candidates must possess or demonstrate 1 year of related specialized experience equivalent to at least the next lower grade level. *Id.* at 21, 66 of 67.

¶11 In its January 20, 2011 letter to DOL responding to the appellant's complaint, the agency stated that, according to the appellant's unofficial transcript, he met the positive education requirements for the position because he had completed nine behavioral or social science-related courses totaling 27 credit hours. IAF, Tab 5, Subtab 2c at 2. The agency further indicated that the appellant met the 1 year of specialized experience that was equivalent to the GS-11 grade level and was in or directly related to the position to be filled. *Id.* These determinations were made by Marcia Gosha-Caldwell, who did not provide a title when signing the January 20, 2011 letter, but, as of an agency filing dated April 9, 2012, was a Supervisory HR Specialist at the agency. IAF, Tab 5, Subtab 2c at 2; CF, Tab 6 at 8 of 67. Therefore, as of January 2011, it appears that the agency had found the appellant qualified for the Social Science Analyst (Organizational Development) position.

¶12 After reconstructing the selection process in February 2012, however, the agency, through Nakia Kamara, an HR Specialist, and Jackie Salter, a Subject Matter Expert, determined that the appellant did not meet the OPM qualification standards and specialized experience requirements for the position. CF, Tab 6 at 5, 20-23 of 67. Specifically, the agency determined that the appellant's application package showed that he had degrees in business administration and

university attended, and, if that number cannot be obtained, the agency will consider 24 semester hours equivalent to the major field of study. IAF, Tab 5, Subtab 2c at 1.

management and possessed general administrative experience, but did not show that he met the OPM qualification standards for the position or that he had performed duties and responsibilities in prior positions at the scope and level of complexity required for the position. *Id.* at 17-18, 22-23 of 67.

¶13 In order to properly reconstruct a selection, an agency must conduct an actual selection process based on the same circumstances surrounding the original faulty selection. *Washburn v. Department of the Air Force*, [119 M.S.P.R. 265](#), ¶ 14 (2013). This includes taking the original selectee out of the position, conducting and evaluating interviews so that they are meaningfully comparable with the original selectee's interview, and filling the same number of vacancies as before. *Id.*; see *Phillips*, [114 M.S.P.R. 19](#), ¶¶ 15-19. Based on the record before us, we are unable to determine whether the agency removed the original selectee from the position, whether the agency employed the same criteria for selection during the reconstructed selection process that it employed during the original selection process, or whether the agency changed the selection process when it reconstructed the original selection. Indeed, although the agency claims that the appellant's score of 94.69 during the original selection process was only a "preliminary" score based upon his "self-assessment," the record shows that the three top-ranked applicants from the original selection process were forwarded to the selecting official based upon those same, so-called "preliminary" scores. CF, Tab 6 at 17, 20; IAF, Tab 5, Subtabs 2i, 2l. Further, while we recognize that VEOA does not enable veterans to be considered for positions for which they are not qualified, see *Ramsey*, [87 M.S.P.R. 98](#), ¶ 9, the agency has not set forth any explanation for its apparent change in its assessment of the appellant's qualifications since its January 20, 2011 letter to DOL, or how this apparent change is consistent with an appropriate and lawful reconstruction of the selection process. Therefore, we are unable to find the agency in compliance with our Opinion and Order. See *Williams v. Department of the Air Force*, [110 M.S.P.R. 451](#), ¶¶ 9, 15 (2009) (finding the agency not in compliance with the

Board's order to reconstruct the selection process when the agency previously stipulated that it would have selected the appellant in the absence of the veterans' preference violation, but it failed to select him in the reconstructed selection process without adequate explanation for the inconsistency). Accordingly, we remand the appeal for further development of the record. *See Deems v. Department of the Treasury*, [107 M.S.P.R. 603](#), ¶¶ 1, 5-6 (2008) (the Board remanded the appeal to supplement shortcomings in the factual record that were material to a determination of whether the agency was in compliance with the Board's final order to reconstruct the selection process for the positions at issue in accordance with veterans' preference laws); *Spates*, 70 M.S.P.R. at 442 (the Board remanded the appeal because the record was insufficiently developed to allow a determination as to whether the agency was in compliance with the Board's final order to return the appellant as nearly as possible to the status quo ante after mitigation of the penalty).

¶14 On remand, the agency is required to produce relevant, material, and credible evidence of compliance in the form of documentation or affidavits. *Spates*, 70 M.S.P.R. at 443. The administrative judge shall then issue a new compliance initial decision based on the evidence submitted. *Id.* Should the administrative judge find the agency's explanation for its apparent change in its assessment of the appellant's qualifications not credible, then the administrative judge shall find the agency in noncompliance with the Board's Opinion and Order.

ORDER

¶15 Accordingly, we vacate the compliance initial decision and remand this appeal to the regional office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Herbert Russell v. Department of Health and Human Services

MSPB Docket No. DC-3330-11-0405-C-1

¶1 I do not agree that this compliance matter should be remanded for additional proceedings. A remand might be warranted if there were a bona fide dispute over whether the appellant was qualified for the Social Science Analyst position at the time he submitted his application. The administrative judge found, however, that the appellant's education was in the wrong field and that he lacked the requisite work experience, Compliance File, Tab 8 at 5, and the appellant does not raise a serious challenge to this finding. As noted by the majority, and contrary to the appellant's argument, the Board has no authority to review whether the agency should have announced the position in a different job series for which the appellant was qualified. As further noted by the majority, the Veterans Employment Opportunities Act was not intended to be a vehicle for a veteran to obtain appointment to a position for which he is not qualified. *See Ramsey v. Office of Personnel Management*, [87 M.S.P.R. 98](#), ¶ 9 (2000). Under these circumstances, the only result that the administrative judge could reach on remand is the one that she has already reached, namely, the agency did not violate its legal obligations to the appellant when it declined to appoint him to the Social Science Analyst position upon reconstruction of the selection process.

¶2 Although the majority suggests that the agency's explanation for changing its assessment of the appellant's qualifications is implausible, in my view what happened is understandable. Ideally, the agency would have raised the appellant's lack of qualifications at the merits phase of this appeal instead of in response to the appellant's petition for enforcement. Nevertheless, up until the full Board issued its decision finding that the appellant was entitled to 10 veterans' preference points instead of 5, the agency had no reason to give the

appellant's application special scrutiny; under the agency's initial, faulty assessment, the appellant was not referred to the selecting official for consideration and there was no prospect that he would be appointed. It is not clear what more the agency could say on remand, and the result is foregone in any event because the agency cannot be ordered to appoint the appellant to a position for which he is not qualified.

Mark A. Robbins
Member